

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD EUGENE HODGE,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2011

No. 294830

Oakland Circuit Court

LC No. 2009-225350-FC

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b, and two counts of second-degree criminal sexual conduct, MCL 750.520c. The trial court sentenced him, as a third habitual offender, MCL 769.11, to 62 to 99 years' imprisonment for each first-degree CSC conviction and 5 to 15 years' imprisonment for each second-degree CSC conviction, all to be served concurrently. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

**I. FACTS**

Defendant was convicted of sexually abusing a nephew. The victim testified that the abuse began when he was six years old and occurred repeatedly and regularly until the victim was ten years old. During this time, defendant was his legal guardian and the victim lived in defendant's household. According to the victim, defendant regularly made him perform fellatio on defendant to the point of ejaculation, and defendant also made him use his hand to stimulate defendant's penis to ejaculation. Defendant also engaged in acts of penile and digital penetration of the victim's rectum.

The victim testified that defendant once hit him when he would not lick defendant's penis. Defendant also sometimes threatened him by saying he "was going to have to do it the hard way," which the victim understood to mean, "Put his penis in my butt." Defendant also told the victim that if he told someone else what was happening, the victim would go to a foster home. Defendant also threatened to kill the victim, and the victim's brother and sister.

Defendant's brother testified that defendant admitted to him that he sexually abused the victim by making the victim perform fellatio and by sodomizing him. According to defendant's brother, defendant stated that "he knew he could beat this charge because [the victim's] slow,

he's a retard," and because the victim "would not be able to make it through court because he's a retard and will lock up on the stand[.]"

## II. PROSECUTORIAL MISCONDUCT

Defendant argues that he is entitled to a new trial because the prosecutor made an improper appeal for sympathy during closing rebuttal argument when she urged the jury not to "punish" the victim. Because defendant did not object to the challenged remark at trial, this issue is not preserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must establish that an error occurred, that it was plain (i.e., clear or obvious), and that the error affected his substantial rights, which generally requires a showing that it affected the outcome of the trial court proceedings. *Id.* at 763-764. If these requirements are satisfied, this Court must exercise discretion in deciding whether to reverse. Reversal is only warranted "when the forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (internal quotation marks omitted).

In this case, the victim's mental disabilities were recognized and mentioned by both parties at trial. The prosecutor noted in both her opening statement and her closing argument that the victim "obviously has some delays" and "impairments." Defense counsel agreed that the victim "has deficits" and commented on how he testified with a "flat affect." During defense counsel's closing argument, counsel argued that some of the victim's responses suggested that he had been coached and scripted with respect to the allegations. In rebuttal, the prosecutor responded to defense counsel's remarks by emphasizing that the delay in the victim's responses were consistent throughout his testimony, including when he was asked the year he was born and his school grade-level. Near the end of the prosecutor's rebuttal argument, she asserted:

Don't punish [the victim] because he's not articulate. Don't punish an eleven year old boy because he had some delays when he came in the courtroom. That is the way he is and he can't help that.

Ladies and gentleman, I ask that you look at all of this, all of the evidence in this case and use your reason and your common sense and apply it to the facts of this case, and I ask that you find the defendant guilty of all five counts.

Defendant correctly argues that a prosecutor may not appeal to the sympathies and emotions of the jurors. For example, in *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988), this Court concluded that the prosecutor improperly appealed to the jurors' emotions and "inject[ed] the element of sympathy" for a ten-month-old child by repeatedly referring to the "poor innocent baby."

In this case, the prosecutor's references to the victim being "not articulate" and having "some delays" were proper comments that addressed his manner of testifying. The prosecutor's request that the jury not "punish" the victim was made in the context of asking the jury not to discount the victim's testimony because of his disability. In this context, the remark was not an

appeal for sympathy. Furthermore, to the extent the remark could be perceived as improper, it was brief, isolated, not blatantly inflammatory and the trial court instructed the jury not to let sympathy or prejudice influence its decision. Under the circumstances, the court's instruction was sufficient to protect defendant's substantial rights. Therefore, defendant is not entitled to appellate relief.

### III. PROPORTIONALITY OF THE SENTENCES

Next, defendant challenges his sentences of 62 to 99 years' imprisonment for the first-degree CSC convictions, which constitute a departure from the sentencing guidelines range of 171 to 427 months. Defendant does not dispute that there were substantial and compelling reasons to depart from the guidelines range, but challenges the extent of the departure. We review the extent of a trial court's departure from the guidelines for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.* The "principal of proportionality" defines the standard against which the substantial and compelling reasons in support of a departure are to be assessed. *Id.* at 304.

The trial court explained its reasons for departing from the guidelines range and its justification for the extent of the departure as follows:

The court finds that an upward departure is justified in this case based on the following independent factors, each of which warrants a departure: number one, he threatened to kill the victim; number two, he threatened to kill the victim's brother; number three, he threatened to kill the victim's sister; number four, repeated criminal conduct over the course of many years—not many years, but a few years involving these crimes, seriatim on a weekly basis; number five, he made his own nephew, in essence, a sex slave when his nephew was brought into his custody for care and nurturing, a total betrayal of trust in the family relationship.

I find these deviations are appropriate because these factors are objective and verifiable, keenly and irresistibly grab the court's attention, are self-evident and considerable worth in sentencing the defendant.

The sentences imposed is [sic] proportionate to the offense and the offender because the top of the guideline range is 427 months. The upward deviation includes a substantial deviation to this range but it is proportional because these factors are not—either not accounted for at all, or are not given appropriate weight in light of the totality of the circumstances surrounding the defendant and the offense.

The guideline range did not contemplate this course of conduct and those five independent factors which I've listed out.

I have reviewed the sentencing grid in connection with this offense. The deviation is proportional based at looking at the sentencing grid -- adjacent -- (undecipherable)—underneath for habitual fourth offender and an OV level of

100. Plus, the sixty-two years is actually two months lower than the maximum of the sentencing grid of 750 months.

I find that based on Supreme Court precedent, which suggests that the court review adjacent grids and circumstances surrounding them that this deviation is fully supportable.

The trial court appropriately compared the facts and circumstances of defendant's situation with the sentencing guidelines ranges under comparable adjacent cells of the applicable sentencing grid to justify the extent of its departure from the guidelines. Under the guidelines as scored, defendant received 72 total prior record variable ("PRV") points, placing him in PRV Level E (50 to 74 points), and 80 total offense variable ("OV") points, placing him in OV Level V (80 to 99 points), resulting in a guidelines range of 171 to 285 months. MCL 777.62. Because defendant was sentenced as a third habitual offender, the upper end of that range was increased to 427 months.

As the trial court recognized, defendant's status as a third habitual offender and his placement in PRV Level E reflected only his actual prior convictions, yet the evidence showed that he had engaged in repeated criminal conduct over the course of many years, on a weekly basis. In addition, defendant's placement in OV Level 5 did not reflect additional offense characteristics that were not considered in the scoring of the guidelines. Under these circumstances, it was not inappropriate for the trial court to consider the sentencing guidelines ranges under the adjacent E-VI and F-V cells, as enhanced for a fourth habitual offender, both of which are 225 to 750 months, as a gauge for determining a proportionate sentence. The 62-year minimum sentences imposed by the trial court are within these ranges. Although the extent of the departure is substantial, the trial court's explanation for its departure reflects a reasonable and principled outcome. Thus, the trial court did not abuse its discretion.

Affirmed.

/s/ Jane E. Markey  
/s/ Brian K. Zahra  
/s/ Pat M. Donofrio